RIBUWAJAR DEVELOPMENT SDN BHD

v.

RATUS MAYANG SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CIVIL SUIT NO: S. 22-34 OF 2001]
14 DECEMBER 2001

CIVIL PROCEDURE: *Pleadings - Amendment of - Whether application to amend done in good faith and without prejudice - Whether proposed amendments rendered useless - Whether amendments would change nature of suit to another and inconsistent character - Whether application to be granted*

The plaintiff commenced proceedings against the defendant for debt owed pursuant to a timber extraction agreement and the supplementary agreement. Subsequently, the plaintiff submitted an application to amend the statement of claim. It was contended that the amendments were necessary to correct honest mistakes which would further clarify the circumstances relating to the monetary sum sought for. He added that no new cause of action would be introduced and the amount in question would remain the same.

The defendant objected to the application on the premise that firstly it was made in bad faith, secondly that the defendant would be prejudiced, thirdly that the proposed amendment was useless and finally, that the character of suit would be changed in another and inconsistent case.

Held:

[1] One of the cardinal principles to note in considering an application to amend is that an amendment would be allowed if it could be made without injustice to the opposite party, and if it could be compensated for by costs. Another guideline was to ensure that real question in controversy between the parties to the proceedings is before the court to be determined. (p 61 e)

[2] An application is made in bad faith where there is evidence of *mala fide* tactical manoeuvre on the applicant's part in making the application. This would also include elements of fictitious claims and unreasonable delay in making the application. (pp 60 g, i & 61 a)

[3] In the present circumstances, there was no evidence of bad faith. The defendant had not properly discharged the onus of proving that they had been prejudiced in any way. (p 62 a-b)

[4] The proposed amendments sought to clarify the items leading to the occurrence of alleged debt. This could hardly be described as useless as per the defendant's contention. (p 62 d-e)

[5] The suit involved a claim for an alleged debt. Even with the proposed amendments, the nature of the claim remained the same. The changes merely involved an expansion of items upon which the alleged debt had been incurred and thus would not have the effect of changing the character of the suit. (p 62 f-g)

[Application granted.]

Case(s) referred to:
Hancock Shipping Co Ltd v. Kawasaki Heavy Industries, The Casper Trader [1992] 3 All ER 132 ***(refd)***
Ketteman and Others v. Hansel Properties Ltd and Others [1987] AC 189 ***(refd)***
Lawrence v. Lord Norreys [1888] 39 ChD 213 ***(refd)***
Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd [1995] 4 MLJ 616 ***(refd)***
Skrine & Co v. MBf Capital [1998] 3 CLJ 432 ***(refd)***
Tildesley v. Harper [1878] 10 ChD 393 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] 2 CLJ (Rep) 428 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 27

For the plaintiff - David Wong Dak Wah; M/s Peter Lo & Co
For the defendant - Colin Lau Suan Hua; M/s Colin Lau & Co

Reported by M Maheswaran

JUDGMENT

Richard Malanjum J:
This is an application by the plaintiff to amend its statement of claim *vide* summons in chambers dated 27 August 2001 (encl. 46).

It is supported by an affidavit of David Wong Dak Wah affirmed on 27 August 2001.

The defendant is objecting this application and has filed an affidavit in opposition of Wang Lai Ping affirmed on 30 September 2001 (encl. 60).

There was also a notice given by the defendant in respect of the use or reference to the other affidavits filed in connection to this present action.

The plaintiff is also relying to an affidavit in reply affirmed by Chu Nyen Yu on 5 September 2001 (encl. 70) filed in relation to another pending application in this action.

And during the hearing on 6 September 2001 learned counsel for the plaintiff made an oral application that the para. 10 of the proposed statement of claim be further amended to add the words 'para. 3' therein.

Briefly in the present statement of claim of the plaintiff the main subject matter is a claim for the sum of RM2,948,454.10 as at 14 May 2001 being 'the balance of the contract fees in which full particulars thereof has been forwarded to the defendant'. And the contract fees are related to a timber extraction agreement dated 1 September 2000 and a supplementary agreement dated 21 September 2000.

It was the position of the plaintiff that pursuant to the two agreements mentioned hereinabove the plaintiff proceeded to extract merchantable timber on a piece of land Country Lease No. 095330724.

And it was also the stand of the plaintiff that by a letter dated 2 March 2001 the plaintiff gave a notice of termination of the timber extraction agreement to the defendant on the ground that the defendant failed to regularise its accounts with the plaintiff and thus has breached the said agreement. Another letter of termination was given on 27 March 2001 by the plaintiff to the defendant and added therein a statement that the plaintiff had completed hauling all extracted logs from the area.

On the filing of the present statement of claim the plaintiff also applied for an *ex parte* Mareva injunction which was duly granted on 10 August 2001. The order was subsequently varied by mutual consents of the parties. There is also a pending application by the plaintiff for judgment pursuant to O. 27 of Rules of the High Court 1980.

It is the contention of learned counsel for the defendant that the objection is premised on four grounds, namely, that the application is not made in good faith, that the proposed amendment is useless, that the proposed amendment will change the character of the suit from one to another and inconsistent character and that the defendant will be prejudiced that cannot be compensated in term of costs.

On the other hand learned counsel for the plaintiff submitted that the proposed amendments are necessary only to correct honest mistakes with no new cause of action being introduced. Learned counsel said that the amount of claim remained and hence the proposed amendments would also clarify the circumstances in which the amount claimed was incurred.

The principles of law on amendment are settled and perhaps I should refer to a few of the leading authorities on the point as mentioned by the respective learned counsel for the parties. But it is clear that it is a matter of discretion for the court to exercise judicially.

In the case of *Ketteman and Others v. Hansel Properties Ltd and Others* [1987] AC 189 at p. 212, his Lordship Lord Bandon said this:

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to R.S.C., Ord. 20, r. 5, in The Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

Nearer home in the case of *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191 at p. 192; [1983] 2 CLJ 428 at pp. 429-430, his Lordship Mohd Azmi FJ said this:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] MLJ 248. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned Judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of his discretion to dismiss the appellants' application. We must therefore review the application afresh.

Now, the defendant says that the application is not made in good faith in that with the present statement of claim which only concerns with the allegation that the defendant has failed to settle the extraction fees the plaintiff sought

for an *ex parte* mareva injunction which was duly granted. According to learned counsel that allegation must have influenced the court in allowing the application. And having obtained the order learned counsel said that the plaintiff has now come to this court to amend on the basis that there was an honest mistake. That according to learned counsel would not be sufficient since the plaintiff had secured a mareva injunction earlier on. It is also contended that the assertion of an honest mistake came about after the defendant had filed several affidavits in rebuttal. It is also submitted that the proposed amendments will be prejudicial to the defendant.

For the plaintiff it is submitted that the main purpose for the amendment is to "fully set out and clarify the circumstances in which the debt of RM2,948,454.10 were incurred". According to learned counsel the claim is still for the debt owing due for work done by the plaintiff. It is also asserted that the defendant knew of the debt from day one. In respect of the contention that there was already an order obtained by the plaintiff based on the present statement of claim learned counsel for the plaintiff argued that the present application and that of the mareva injunction should not be mixed but to be considered as separate matters. Attempts were also made to distinguish the cases cited by learned counsel for the defendant in his endeavour to show that the present application was made in bad faith. According to learned counsel for the plaintiff those cases were made at a very late stage of the proceedings and that they were *mala fide* tactical manoeuvers either to delay the proceeding or to overcome a situation during a cross examination stage. In the present case learned counsel says that the application is made at a very stage of the suit and is merely 13 days after the close of the pleadings.

In *Ketteman*'s case *(supra)* honest mistake or fault was not considered as a basis to refuse an application to amend. And unless bad faith is obvious blameworthy is also not a reason for refusing an application. (see also: *Skrine & Co v. MBf Capital* [1998] 3 CLJ 432). And hence the question to ask is: what amounts to bad faith? From the cases cited by learned counsel for the defendant the common thread seems to be that there must be *mala fide* tactical manoeuvre on the part of the applicant in making the application. Thus in the case of *Tildesley v. Harper* [1878] 10 ChD 393 CA at 396-397 Bramwell LJ said this:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In another case of *Lawrence v. Lord Norreys* [1888] 39 ChD 213 CA the court seemed to be of the view that bad faith entailed an element of fictitious claim. And in one local case of *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd* [1995] 4 MLJ 616 the application to amend the defence was refused on

the basis that there was unreasonable delay in making the application and the learned judge was also of the view that 'it was not made *bona fide* and was so made as a tactical manoeuvre to unnecessarily delay the disposal of the action of the plaintiff. He further went on to say that the 'application to amend the defence after the exposure by the plaintiff in his affidavit in support is nothing but a tactic to confuse the issue by creating an imaginary 'triable issue' and to stall, if not to deprive, the plaintiff of his right. If this is allowed it would unnecessarily cause prejudice to the plaintiff which cannot be compensated by costs'.

Having considered the opposing arguments as presented and having taken into account the explanation given for the application I am not convinced that the present application fits into the category of those cases wherein bad faith became the basis for the refusal of the leave to amend. In term of delay there is none. As for tactical manoeuvre I do not think that can be concluded since this is at the very stage of the case. Indeed the basic complaint of the defendant is that the application is made after the affidavits defendant opposing another application of the plaintiff were filed and that a mareva injunction was obtained based on the present statement of claim. As regards the first limb I would say that an application to amend after the filing of affidavits by the opposing side should not *ipso facto* be taken as being made in bad faith. The circumstances and explanation by the applicant should be considered. After all one of the cardinal principles to note in considering an application to amend is that an amendment will be allowed if it can be made without injustice to the opposite party, and if it can be compensated for by costs. Another guideline is to ensure that the real question in controversy between the parties to the proceedings is before the court to be determined. In the present application there is no doubt that it is made after the filing of the opposing affidavits by the defendant. But I do not think it is obvious that this application is made to outdo those affidavits. In the first place the amount of the claim of the plaintiff has not changed. It is only the items upon which the alleged debts were said to have incurred that have changed or varied. In the present statement of claim of the plaintiff the whole debt is premised on the allegation of its being the balance of contract fees incurred pursuant to the timber extraction agreement and the supplementary agreement. With the proposed amendments it is added that part of the debt is for other works rendered and expenses incurred for the defendant which were not within the ambit of those agreements aforementioned. Despite the apparent extension of the alleged basis for the claim I do not think that is sufficient to indicate bad faith. On the contrary it should enable the real question in controversy between the parties to be before the court for adjudication. And as for the fact that an *ex parte* mareva injunction was obtained based on the present statement of claim I am inclined to agree with the learned counsel for the plaintiff that the present application and that of the *ex parte* application should not be taken

as one. Further I would say that such a grievance could be raised later on when dealing with that *ex parte* order. Thus there is therefore no question of the defendant being prejudiced by the proposed amendments.

Accordingly I am not satisfied that there is an element of bad faith on the part of the plaintiff in making the present application. Moreover I have not been convinced by the defendant that it would be prejudiced if the amendment is allowed. The burden lies on the defendant to establish that it would suffer prejudice as a result of the amendment by reason such as witnesses would have difficulty in recalling events or would be unavailable. (see: *Hancock Shipping Co Ltd v. Kawasaki Heavy Industries, The Casper Trader* [1992] 3 All ER 132). In the present application I did not hear the defendant making any assertion of similar nature.

Next issue is whether the proposed amendment is useless as alleged by the defendant. If indeed they are then I find no reason for the defendant to fear them as presumably it should not be affected by them.

However, after carefully perusing the proposed amendments and the implication arising thereof I must say that I have failed to see how it could be said that such proposed amendments would be useless. As stated earlier the proposed amendments expanded the items upon which the alleged debt is said to have been incurred, namely, from being purely contract fees to now include for work done and moneys incurred for and on behalf of the defendant. Surely such an allegation cannot be said to be a useless piece. Hence I find no merit in this ground of objection by the defendant.

Finally on the assertion that the proposed amendments would change the nature of the suit from one character to another and inconsistent character, with respect I also find no basis to come to such a conclusion. At the outset the suit is nothing but a claim for an alleged debt and even with the proposed amendments the nature of the claim remains the same. In fact there is no change in the total sum claimed. Only the alleged items upon which the debt is alleged to have been incurred have been expanded or varied. That cannot be said to have the effect of changing the character of the suit.

In the exercise of my discretion I therefore allow the application of the plaintiff as contained in encl. 46 with the variation as made orally during the hearing. I do not think as well that the defendant will be prejudiced by the proposed amendments in that costs will be inadequate to compensate it. Costs to be taxed unless agreed occasioned by this application is to be paid to the defendant by the plaintiff in any event.